

STATE OF MICHIGAN
COURT OF APPEALS

GORDON WILLFORD, Individually and as Next
Friend of HEATHER WILLFORD, a Minor,

UNPUBLISHED
December 1, 2009

Plaintiffs-Appellees,

v

CATHERINE THORINGTON, as Guardian Ad
Litem of TRAVIS THORINGTON, a Minor,

No. 287909
Gladwin Circuit Court
LC No. 07-003280-NO

Defendant-Appellant.

Before: Talbot, P.J., and O’Connell and Davis, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court’s order denying his motion for summary disposition. We reverse and remand for further proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This suit arises from an injury that high school freshman Heather Willford sustained on October 24, 2005, during a soccer game that occurred during a physical education class at her school. The class had been divided into several teams, and Heather was on the field with her team when classmate Travis Thorington ran onto the field to kick the ball away from her. He missed the ball and connected with Heather’s knee, breaking her femur. There is no evidence that he had any intent other than to kick the ball.

Plaintiffs sued for ordinary negligence and reckless misconduct. Defendant moved for summary disposition, arguing that under *Ritchie-Gamester v City of Berkley*, 461 Mich 73; 597 NW2d 517 (1999), ordinary negligence did not apply because Heather and Travis were participating in a recreational activity and that the injury that Heather received was a risk inherent in the game. Plaintiffs replied that Travis was not a participant because his team was not part of the game that Heather was playing when she was injured.

The trial court held that the only participants in the game were the players from the two opposing teams, including those who were on the field playing and, possibly, those waiting to be called in as substitutes. Defendant was not a participant because he was not a member of either team that was playing. Even if he could be considered a participant, the court held that “a reasonable trier of fact could conclude it was reckless misconduct on the part of Mr. Thorington

to charge out onto the field of play, to go for the ball, and to collide with Ms. Willford when he had no right to be on the field of play at that point in time.”

We review de novo a trial court’s decision to grant or deny a motion for summary disposition. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161-162; 516 NW2d 475 (1994).

Because we must consider the evidence in the light most favorable to plaintiff, we consider the testimony that Travis was just coming onto the field to be true. However, because Travis testified that he was properly in the game being played, there is no evidence concerning *why* he may have been coming onto the field. Heather stated that he was not in the game because he was standing outside the field boundary lines: “I remember when they counted them off and [the physical education teacher] said this team and that team are going to play and this team’s going to play the winner, I remember [Travis] standing with that team.” The trial court assumed, without evidence, that Travis had not been switched to the team that was playing, had not been called in to substitute for someone, or was not simply mistaken in thinking that he was supposed to be playing. Consequently, Heather’s assertion that Travis did not belong on the field amounts to mere speculation.

Further, the trial court’s definition of “participant” in this case is overly narrow. “Participate” is defined in *Random House Webster’s College Dictionary* (2001) as “to take part or have a share, as with others.” This was not a league soccer game with spectators, but a physical education class. Heather testified that positions were not assigned and that there was no goalie. One student testified that the start of the game was simply whoever got the ball first, and whenever a goal was scored new players would come onto the field. The activity was not a single game, but rather a simplified version of the game adapted for the class. Even under a narrower definition, Heather was a participant because she was on the field playing soccer and Travis, despite whether he was supposed to play at that time, was on the field playing in the soccer game. He was not on the field to harm anyone or to “randomly attack[] the ball from the sidelines,” as plaintiffs argue. The parties do not dispute that he was on the field to get the ball away from Heather. “When people engage in a recreational activity, they have voluntarily subjected themselves to certain risks inherent in that activity. When one of those risks results in injury, the participant has no ground for complaint.” *Ritchie-Gamester*, *supra* at 87. Thus, the trial court erred in finding that Travis was not a participant in the game.

The trial court also erred in finding that a question of fact existed regarding whether Travis acted with reckless misconduct. One of the risks inherent in soccer is getting kicked by another player who misses the ball. *Behar v Fox*, 249 Mich App 314, 318; 642 NW2d 426 (2001). Travis’s conduct of “charg[ing] out onto the field of play, [going] for the ball, and [colliding] with Ms. Willford” is typical in a soccer game, and in *Behar*, this Court found no reckless misconduct when an adult assistant coach, using his “full effort” against an 11-year-old, injured the boy’s knee with a misplaced kick. The trial court, in every aspect of its decision, incorrectly relied on Heather’s mere belief that Travis was not supposed to be on the field at that time.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Alton T. Davis